

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>JESSE M. CLIFTON</b>	)	
Claimant	)	
V.	)	Docket Nos. 1,039,222
	)	& 1,040,439
<b>KWIK SHOP, INC.</b>	)	
Self-Insured Respondent	)	

**ORDER**

Claimant appealed the September 4, 2014, Review and Modification Award entered by Administrative Law Judge (ALJ) William G. Belden. The Board heard oral argument on January 13, 2015, in Lenexa, Kansas.

**APPEARANCES**

James E. Martin of Overland Park, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Review and Modification Award. At oral argument, the parties confirmed that the only issue before the Board is the calculation of the award in Docket No. 1,040,439. The parties stipulated 415 weeks from claimant's date of accident is April 18, 2016. They also stipulated claimant filed his Application for Review and Modification on March 25, 2014, and the modification of claimant's original award should commence on September 25, 2013.

**ISSUES**

On December 14, 2009, the parties settled claims in Docket Nos. 1,039,222 and 1,040,439. On March 25, 2014, claimant filed an Application for Review and Modification in both claims. ALJ Belden granted claimant's requests to modify the awards. Although both docket numbers are considered appealed, the issue on appeal concerns only Docket No. 1,040,439.

Claimant does not take issue with the ALJ's finding of an 80% work disability in Docket No. 1,040,439, but asserts the ALJ did not properly calculate the compensation awarded.

Respondent maintains the ALJ correctly calculated and applied the 80% work disability finding and requests the Review and Modification Award be affirmed.

The sole issue is: what is the correct calculation of claimant's permanent partial disability benefits in Docket No. 1,040,439?

#### FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

On December 14, 2009, the parties settled Docket No. 1,040,439. Claimant received \$3,000 for a whole person functional impairment resulting from a May 5, 2008, low back injury. All issues were left open, including the right to seek review and modification.

Claimant, on March 25, 2014, filed an Application for Review and Modification in Docket No. 1,040,439, asserting he was entitled to additional compensation because he was terminated by respondent in 2011. The ALJ found claimant sustained an 80% work disability. The following two excerpts from the Review and Modification Award explain the ALJ's calculation of the award:

The Court concludes Claimant is entitled to modification of his award to reflect an 80% work disability starting six months preceding the date the application for review and modification was filed, and continuing until 415 weeks from the date of accident have elapsed, see *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 200 (2002), or until further order. Respondent is entitled to a credit for the weeks of compensation previously paid. See *id.* Thus, Claimant shall receive a total award of 115.14 weeks of permanent partial disability compensation representing compensation for 80% work disability starting six months preceding the date of the filing of the application for review and modification and continuing until 415 weeks from the date of the accident have elapsed, less a credit to Respondent of 11.24 weeks of permanent partial disability compensation previously paid to be applied to the sums currently due and owing, unless later modified. See *Juett v. State*, Docket Nos. 241,926; 1,034,321; 1,042,037, p.5 (W.C.A.B. 2012).

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WHEREFORE AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR OF Claimant, Jesse M. Clifton, and against Self-Insured Respondent, Kwik Shop, Incorporated. Effective December 27, 2013, Claimant is entitled to 115.14

weeks of permanent partial general disability compensation at \$266.97 per week, based on an 80% work disability, through March 10, 2016, which is the date the 415-week review and modification period expires. Credit is given for the \$3,000.00 in permanent partial disability benefits already paid (11.24 weeks at \$266.97 per week). Respondent will owe an additional 103.90 weeks of permanent partial general disability compensation at \$266.97 per week, totaling \$27,738.18. As of September 4, 2014, there is due and owing 24.76 weeks of permanent partial disability compensation at \$266.97 per week, totaling \$6,610.92, which represents 36 weeks of compensation starting December 27, 2013 less a credit of \$3000.00 for 11.24 weeks of compensation previously paid. The remaining balance of \$21,128.01 shall be paid for 79.14 weeks at \$266.97 per week, until fully paid or upon further order.<sup>1</sup>

### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 44-528(d) states:

Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

In *Ponder-Coppage*,<sup>2</sup> the Kansas Court of Appeals held K.S.A. 44-528(d) provides the earliest effective date of a review and modification award is six months prior to the filing of the application for review and modification. The court also held that K.S.A. 44-510e(a) restricts disability compensation to 415 weeks following the date of the work injury. The Kansas Court of Appeals stated:

Claimant places her reliance on the language of K.S.A. 44-510e(a)(3), which states: "In any case of permanent partial disability under this section, the employee *shall be paid compensation for not to exceed 415 weeks following the date of such injury*, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto." (Emphasis in original.)

The effective date of an award is the day after the date noted in the award. K.S.A. 44-525(a). If there is an increase in functional impairment or work disability, the award may be modified by increasing or diminishing the compensation. However, the date for any modification based upon an increase or diminishment in the functional impairment or work disability "shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the

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<sup>1</sup> Review and Modification Award at 9-10.

<sup>2</sup> *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

effective date of any such modification *be more than six months prior to the date the application was made for review and modification under this section.*" (Emphasis in original.) K.S.A. 44-528(d).

K.S.A. 44-528(d) clearly states that the effective date of a modified award is 6 months before the date that the application for review and modification was filed. In this case, the Board concluded that the effective date of the award was April 12, 1998. We agree with the Board and affirm that decision.

. . .

K.S.A. 44-528(d) is not a statute of limitations. It authorizes modification of the award based upon changes in the claimant's condition and entitlement to benefits as set out by the statutes. The effective date language in 44-528 benefits both parties. If the condition is increased or decreased, the extent or duration of a claimant's disability and the employer's liability are redetermined under K.S.A. 44-510e(a). The net result of this is that the employer's previous payments are deducted from the modified award so that the claimant receives the maximum benefits for the disability and the employer does not overpay for the disability.

K.S.A. 44-510e(a) sets forth the number of weeks that compensation is received but limits that compensation to 415 weeks from the date of the work-related accident. Consequently, even if the effective date of a modified award is 6 months before the application was filed, the modified award only compensates for the remaining unpaid weeks, if any, that are proven but not yet expired. If an employer has paid the maximum amount, the modified award does not offer further payment.<sup>3</sup>

Claimant asserts the correct calculation of his permanent partial disability (PPD) benefits is to multiply 415 weeks by the 80% work disability awarded by the ALJ. That entitles claimant to 332 weeks of benefits, less any amounts previously paid. Claimant's benefit rate is \$266.97 per week, which claimant asserts calculates to \$88,634.04 (332 weeks x \$266.97 per week = \$88,634.04). Claimant accedes respondent is entitled to a \$3,000 credit, reducing claimant's award to \$85,634.04.

In support of his position, claimant cites *Juett*.<sup>4</sup> Mr. Juett was granted a modification of his award and received a 50% PPD based upon work disability. The ALJ determined the period from claimant's date of accident through October 1, 2010, the last date claimant earned wages with respondent, was to be disregarded for purposes of calculating the award. The ALJ then determined the remaining 299 weeks, from October 1, 2010, through the end of the 415-week time limit set forth in K.S.A. 44-510e would be multiplied by the 50% work disability, leaving 149.5 weeks of PPD compensation due at the rate of \$529 per

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<sup>3</sup> *Id.* at 198-200.

<sup>4</sup> *Juett v. State*, Nos. 241,926, 1,034,321 & 1,042,037, 2012 WL 369763 (Kan. WCAB Jan. 10, 2012).

week. That calculated to an award of \$79,085.50. When added to the \$14,272.42 already paid, the total award would be \$93,357.92. The Board modified, finding Mr. Juett's 50% work disability was effective commencing October 1, 2010, and resulted in an award that exceeded the \$100,000 statutory maximum. Therefore, Mr. Juett was entitled to \$100,000, less \$14,272.42 previously paid, or \$85,727.58.

Respondent argues that under K.S.A. 44-528(d), claimant's work disability commences six months prior to his Application for Review and Modification, or September 25, 2013. Respondent also argues claimant, under K.S.A. 44-510e(a), may not receive PPD payments beyond the 415-week period following his accident, or April 18, 2016. Thus, claimant is limited to PPD payments from September 25, 2013, through April 18, 2016. That calculates to \$35,736.60 (133.86 weeks x \$266.97 per week = \$35,736.60).<sup>5</sup>

Respondent cites *Speck*.<sup>6</sup> Ms. Speck was awarded a 12.5% permanent partial impairment of function to the whole body as the result of an April 3, 2001, work injury. On May 21, 2009, Cessna was no longer able to accommodate her restrictions. Ms. Speck sustained a 65% work disability. The ALJ determined more than 415 weeks had passed since Ms. Speck's accident and, therefore, she could not modify her award. The Board affirmed, stating:

The Board has considered claimant's argument, but nevertheless agrees with the ALJ's analysis. The Board concludes Judge Barnes correctly interpreted K.S.A. 44-510e and, consequently, the Board agrees claimant was limited to the 415 weeks of temporary and permanent partial disability benefits that claimant has received.

Although claimant seems to argue that in a review and modification proceeding K.S.A. 44-528 provides its own cause of action that is unlimited in monetary value and not limited in weeks, the statutes belie that argument. K.S.A. 44-528 specifically conditions a modification of an existing award "*subject to the limitations provided in the workers compensation act.*" (Emphasis in original.) One of those limitations is plainly found in K.S.A. 44-510e(a). An injured employee's compensation for disability shall not exceed a maximum of 415 weeks. [Footnote citing K.S.A. 44-510e(a).] That same statute provides:

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this

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<sup>5</sup> The \$3,000 settlement claimant previously received is not subtracted from the \$35,736.60.

<sup>6</sup> *Speck v. Cessna Aircraft Company*, No. 265,202, 2010 WL 3093214 (Kan. WCAB July 14, 2010).

section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, *subject to review and modification as provided in K.S.A. 44-528*. [Footnote citing K.S.A. 44-510e(a)(3).] (Emphasis in original.)

The Board finds this language controlling. In addition, the Court of Appeal[s'] finding in *Ponder-Coppage* [*v. State*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002)] further supports this finding. Although claimant invites the Board to overrule the holding in *Ponder-Coppage* based upon the strict construction approach recently embraced by our Supreme Court in *Casco* [*v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007)] and *Bergstrom* [*v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009)], the Board is unwilling to do so. There is binding precedent for the ALJ's decision and the Board is duty bound to follow based upon the principle of *stare decisis*.

In *Cabrera*<sup>7</sup> and *Williams*,<sup>8</sup> the injured workers received awards for compensation and later filed applications for review and modification because they became unemployed. In *Cabrera*, Ms. Cabrera sustained a work injury on May 18, 1995. She was awarded a 65% work disability commencing May 1, 1999. The Board limited Ms. Cabrera to a maximum of 415 weeks of temporary and permanent partial disability benefits commencing with her date of accident. In *Williams*, the Board made a similar finding, stating in part:

K.S.A. 44-510e(a)(3) allows that benefits shall run for 415 weeks from the date of the accident. The Kansas Court of Appeals, in *Ponder-Coppage*, determined that this time limit applied even when a review and modification under K.S.A. 44-528 was being claimed. Here, claimant's accident occurred on May 16, 2001. And 415 weeks thereafter would be April 29, 2009. Therefore, even with the change in claimant's disability allowing the modification, the last date on which any modification would be allowed under K.S.A. 44-510e(a)(3) would be April 29, 2009.

At oral argument, claimant argued *Ponder-Coppage* should be disregarded or overturned. Claimant asserts the Kansas Court of Appeals did not provide reasoning for its decision to incorrectly interpret K.S.A. 44-510e(a) to mean that disability payments are limited to 415 weeks after a claimant's accident. Claimant asserts a plain reading of K.S.A. 44-510e(a) does not limit his PPD to 415 weeks after his work accident, but rather limits PPD to a total of 415 weeks.

The Board disagrees with claimant's argument. In *Juett*, claimant's award of work disability was limited by the \$100,000 cap imposed by K.S.A. 44-510f. In the present claim, claimant's 80% work disability did not result in an award exceeding \$100,000 in compensation. The Kansas Court of Appeals in *Ponder-Coppage* and the Board in *Speck*,

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<sup>7</sup> *Cabrera v. Casco, Inc.*, No. 198,074, 2000 WL 1864310 (Kan. WCAB Nov. 30, 2000).

<sup>8</sup> *Williams v. Wesley Medical Center*, No. 270,044, 2010 WL 769915 (Kan. WCAB Feb. 26, 2010).

*Cabrera* and *Williams* have clearly ruled that under K.S.A. 44-510e(a), an injured worker's PPD benefits are limited to the 415 weeks following his or her work accident.

Until *Ponder-Coppage* is reversed or modified, the Board is bound by its precedent. Claimant is awarded an 80% work disability. That calculates to 332 weeks of PPD benefits at the rate of \$266.97 per week, less a credit of 11.24 weeks of PPD benefits previously paid ( $\$3,000 \div \$266.97 = 11.24$  weeks), or 320.76 weeks of PPD benefits. However, claimant is limited by K.S.A. 44-510e(a) and K.S.A. 44-528 to 133.86 weeks of PPD benefits from September 25, 2013, through April 18, 2016, at the rate of \$266.97 per week, or \$35,736.60. The Board finds respondent should not be given an additional credit of 11.24 weeks of PPD benefits for his settlement against the 133.86 weeks claimant is awarded, as respondent has already been given credit for the same, as set forth above.

### CONCLUSION

Claimant's award in Docket No. 1,040,439 is modified as set forth above.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>9</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### AWARD

#### Docket No. 1,040,439

**WHEREFORE**, the Board modifies the September 4, 2014, Review and Modification Award entered by ALJ Belden as follows:

Effective September 25, 2013, claimant has an 80% work disability, which calculates to 332 weeks of permanent partial disability benefits less 11.24 weeks of permanent partial disability benefits previously received, or 320.76 weeks of permanent partial disability benefits, at the rate of \$266.97<sup>10</sup> per week, or \$85,633.30. However, claimant is limited by K.S.A. 44-510e(a) and K.S.A. 44-528 to 133.86 weeks of permanent partial disability benefits from September 25, 2013, through April 18, 2016, at the rate of \$266.97 per week, or \$35,736.60.

As of March 17, 2015, there is due and owing to the claimant 77 weeks of permanent partial disability benefits at the rate of \$266.97 per week, or \$20,556.69, which

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<sup>9</sup> K.S.A. 2013 Supp. 44-555c(j).

<sup>10</sup> Claimant's average weekly wage is \$400.44.

is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$15,179.91 shall be paid at the rate of \$266.97 per week until paid or further order of the Director.

The Board adopts the remaining orders set forth in the Review and Modification Award that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant  
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Honorable William G. Belden, Administrative Law Judge